No. 04-594

IN THE

Supreme Court of the United States

LAWRENCE (BUD) MOON, JR., *et al.*,

Petitioners,

v.

NORTH IDAHO FARMERS ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF IN OPPOSITION

PETER C. ERBLAND
PAINE, HAMBLEN, COFFIN, BROOKE, & MILLER, LLP
701 Front Avenue, Suite 101
P.O. Box E
Coeur d'Alene, ID 83816-0328
(208) 664-8115

GARY H. BAISE
Counsel of Record
ALEXANDER M. BULLOCK
STEWART D. FRIED
ANSON M. KELLER
KILPATRICK STOCKTON, LLP
607 14th Street, NW, Suite 900
Washington, DC 20005-2018
(202) 508-5800

Attorneys for Respondents

191905

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Respondents, including all individual farmer ("Farmers") defendants and the North Idaho Farmers Association ('NIFA") file this joint Brief in Opposition to the Petition for Certiorari filed by Petitioners and respectfully submit that no basis exists upon which a Writ of Certiorari should be granted. Initially, under the provisions of 28 U.S.C. § 1257, this Court should not grant certiorari because no final decision on any question of federal law has been decided by the Idaho Supreme Court ("ISC"). Even in the event that this Court determines that it does have jurisdiction to consider granting certiorari, Petitioners have failed to identify any compelling rationale, as identified in Sup. Ct. R. 17, for this Court to hear this case in its current posture at this time. Petitioners will have ample opportunity to challenge the constitutionality of the Idaho statutes at issue after the record has been more fully developed and the matter has been fully litigated in the courts below. Indeed, as the ISC noted in its opinion, the record below is far from complete on any factual issue, including the lack of any economic damages to their property. Secondly, Idaho has never recognized the purported property right that Petitioners allege has been taken. Accordingly, Respondents respectfully submit that this petition be denied.

COUNTERSTATEMENT OF THE CASE

This matter comes before this Court on the petition for certiorari from an interlocutory decision of the ISC, *Moon, et al. v. North Idaho Farmers Association, et al.*, 140 Idaho 536, 96 P.3d 637 (2004), which, in turn, was an interlocutory appeal from a non-final order of the Kootenai County District Court ("trial court"), dated June 4, 2003. In its order, the

trial court declared the Idaho Legislature's 2003 amendments to the Idaho Smoke Management and Crop Residue Disposal Act (IC §§ 22-4801-4804) ("Smoke Management Act") unconstitutional under both the United States and Idaho Constitutions. The 2003 amendments, known as House Bill 391 ("HB 391"), amended the Smoke Management Act and clarified Idaho's nuisance statute, IC § 52-108, as applied in this case. These amendments reaffirmed the long-standing rule in Idaho that certain agricultural activities are exempt from nuisance actions, including the carefully controlled and statutorily permitted burning of agricultural crop residue. IC § 52-108. Although the Smoke Management Act applies to the burning of agricultural crop residue throughout Idaho, this case deals specifically with the burning of Kentucky Bluegrass post-harvest straw and stubble by Farmers, a practice that has been utilized for decades to return nutrients to the soil and to stimulate the plants and fields for the next harvest of bluegrass seed. HB 391 applies state-wide, but imposes stricter restrictions upon ten counties in north Idaho. The restrictions contained in HB 391 mandate that a farmer may not burn agricultural crop residue in certain north Idaho counties without registering for permission with, and receiving specific daily authorization from, the Idaho Department of Agriculture. HB 391 was not created in a secret and sinister vacuum, as Petitioners suggest. To the contrary, it was enacted by the Idaho Legislature after extensive legislative hearings, in which one of Petitioners' counsel testified as a witness before the Idaho Senate. HB 391 is an excellent example of the Legislature's efforts to balance the State's interest in reducing loss of agricultural resources with the need to protect public health.

THE COURSE OF THE LOWER COURTS' PROCEEDINGS

a. The Complaint and Motion for an Injunction and Motion to Dismiss.

On June 10, 2002, Petitioners, eight persons claiming unusual susceptibilities to grass smoke, filed an action, self-styled as a "class action," against seventy-eight individual farmers who grow Kentucky bluegrass seed in North Idaho for commercial sale, NIFA, and the State of Idaho.[1] Petitioners, who claim to be hypersensitive to unknown particulates allegedly contained in Kentucky bluegrass smoke, pled causes of action for nuisance, trespass, strict liability, civil conspiracy and medical monitoring. Petitioners sought injunctive relief and past and future damages for themselves and for the alleged class. In addition, they asked for an order "declaring a subsection of Idaho's Right to Farm Act . . . in particular IC § 22-4503, along with IC § 52-108, unconstitutional and void as applied to the facts of this case because the State of Idaho has taken plaintiffs' property without just compensation by granting defendant farmers an easement . . .". (R., Vol. I, p. 5, ¶ 10). Petitioners filed a motion for a preliminary injunction shortly after filing their complaint. In response to the complaint, Defendants filed a motion to dismiss pursuant to IC § 52-108.

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1. The claims against the State of Idaho were voluntarily dismissed shortly after the action was filed.

b. The Trial Court Grants a Preliminary Injunction Against Farmers' Agricultural Burning.

On August 30, 2002, the trial court issued an order granting Petitioners' motion for a preliminary injunction, in spite of its own notation that "the record before the Court is incomplete because citizens' medical records have only recently been disclosed to counsel for [Respondents] at the time of the August 15, 2002, hearing. . . . the issues of law are somewhat complex. The matter is not 'free from doubt'." (Petitioners' App. at 132a). Despite the trial court's recognition that Respondents had no opportunity to even review, much less analyze, the limited health records of Petitioners made available to them prior to the hearing, the trial court issued a preliminary injunction order and declared that smoke from field burning "endangers the health" of Petitioners and found it to be a nuisance.

The trial court then enjoined Respondents from burning their fields unless they baled the post-harvest materials and posted a bond in the sum of One Hundred Thousand Dollars ($100,000) for Petitioners to use for medical expenses and travel for relocation during the burn season, without benefit of bench trial or jury determination of Respondents' liability. The trial court pointed out that causation and apportionment did not need to be decided at that time. (Petitioners' App. at 129a). However, in light of assertions at the hearing that Plaintiffs' counsel could not prove which smoke came from which Farmer, the trial court referred to IC § 6-803 dealing with joint and several liability and stated that certain portions of it "may well apply to the smoke from field burning" and "[i]t could be that the farmers are acting in concert" and that even if "liability may be several, but if apportionment is difficult or impossible, Defendants have the burden of proving their individual contribution, not the Plaintiffs." (Petitioners' App. at 130a).

c. The ISC Grants a Writ of Prohibition.

Farmers immediately petitioned the ISC for a Writ of Prohibition, a highly unusual request under Idaho law that is infrequently granted. The ISC issued a Writ of Prohibition on September 12, 2002, the first such writ issued in this procedural posture in many years. The ISC found that "it appears the injunction ordered by the trial court . . . exceeds in some respects the trial court's jurisdiction and should therefore be stayed." (Petitioners' App. F at 196a). The ISC further stated that the stay was "issued without prejudice to the trial court's or this Court's right to consider these issues ***after there has been a full presentation of evidence and legal authorities***." *Id.* (Emphasis added).[2]

d. The Idaho Legislature Enacts House Bill 391.

In reaction to the trial judge's erroneous decision, the Idaho Legislature amended the Smoke Management Act to state, unambiguously, that no private nuisance or trespass claims could be brought as a result of agricultural burning subject to the farmers' compliance with the statute and regulations to be promulgated thereunder. The Director of ISDA is also required to determine prior to burning that "no other economically viable alternatives . . . are available."

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2. Respondents contend that after the granting of the Writ of Prohibition, their right to a dismissal of Petitioners underlying complaint remains available under both IC 52-108 and under IC §§ 22-4801-4804. This argument is bolstered by ISC's comment in the underlying case that there are "no facts presented at this stage of the case" *Moon*, 140 Idaho at ___, 96 P.3d at 646. Indeed, Petitioners have failed to establish in a full trial on the merits either economic loss or permanent physical injury to their property caused by agricultural field burning of bluegrass straw and stubble.

IC § 22-4803. Both the Idaho Legislature in HB 391 and the ISC have noted the importance of agriculture to Idaho. "The State of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development." *Carpenter, et al. v. Double R Cattle Co.*, 108 Idaho 602, 608, 701 P.2d 222, 228 (1985).

e. The Trial Court Declares HB 391 Unconstitutional.

On June 4, 2003, the trial court found HB 391 to be unconstitutional for three independent reasons:

- HB 391 takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §§ 13 and 14 of the Idaho Constitution;

- HB 391 violates Article I, § 1 of the Idaho Constitution because the "limitation" imposed by the statue is not in the interests of the common welfare"; and

- HB 391 is a "local or special law" in violation of Article III, § 19 of the Idaho Constitution.

(Petitioners' App. B at 91a.)

The crux of the trial court's opinion was its belief that the owner of real estate has the absolute right to "exclusive" possession of his or her property and no one, including the government, can impinge on or interfere with any of those rights in any way.

f. The ISC grants Petitioners' interlocutory appeal and reverses the trial court.

On July 22, 2003, for the second time in this case, the ISC accepted an interlocutory appeal of the trial court's orders, pursuant to I.A.R. Rule 12(a). After an expedited briefing schedule and oral argument, the ISC squarely rejected the trial court's analysis and reversed its rulings on all grounds, finding that, on its face, HB 391:

> (1) was not an unconstitutional taking of a property right;
>
> (2) did not grant an easement to the farmers;
>
> (3) did not violate constitutional guarantees of the right to possess and protect one's property;
>
> (4) was not an unconstitutional special or local law under Idaho law; and
>
> (5) was neither arbitrary, capricious, nor unreasonable.

The ISC stated that:

> The [Petitioners'] challenge to the statute is a facial challenge, invoking a standard requiring the challenger to establish that no set of circumstances exist under which the Act would be valid. . . . Because there clearly are some interests of the common welfare being protected by the Legislature's action in allowing field burning, we cannot say that the plaintiffs have met their burden

> to show no conceivable constitutional application for this legislation. **There were no facts presented at this stage of the case, and accordingly, an "as applied" challenge is not available to the plaintiffs.**

Moon, 96 P.3d 637, 646 (emphasis added, citations omitted). Relying upon authority from this Court, the ISC noted that "[t]he existence of facts supporting the legislative judgment is to be presumed." *Id.*, citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 58 S. Ct. 778, 783, 82 L. Ed. 1234, 1241 (1938). The Petitioners did not present any facts to challenge the sufficiency or the motivation of the Idaho legislature. "In the absence of such proof, 'the presumption of constitutionality must prevail.'" *Moon*, 96 P.3d at 646, (citation omitted).

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Hear this Petition Under 28 U.S.C. § 1257.

This Court's statutory authority to hear this case is found in 28 U.S.C. § 1257, which states:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or

> immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court has interpreted 28 U.S.C. § 1257 to establish a "firm final judgment rule" and stated in *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81, 118 S. Ct. 481, 486 (1997):

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

See also Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551, 65 S. Ct. 770, 773, 89 L. Ed. 1171 (1945). In this case, no final judgment within the meaning of 28 U.S.C. § 1257 has been rendered by any court. Indeed, as in *Jefferson*, this matter has been to the ISC twice, both times before discovery has been completed, much less any substantive hearings on the merits of this case, and therefore is very much still *sub judice*.

As with *Jefferson*, and many of the other cases interpreting 28 U.S.C. § 1257(a), the facts of this case fit none of the exceptions outlined in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). This matter is still far from a final judgment. No trial on the merits of any of the petitioners' underlying claims has been held. As a result of the stay put

in place during the interlocutory appeal process, discovery has not yet been completed. *Moon*, 140 Idaho at __, 96 P.3d at 646. The ISC issued a remittitur to the trial court on August 18, 2004, and no hearing has yet been held. Once the trial court holds a status conference and issues a scheduling order, significant discovery remains outstanding before trial. On remand, petitioners will have a full and fair opportunity to litigate their claims. If Petitioners are unsuccessful at trial, they will have an appeal to the ISC and, if necessary, the opportunity to seek a writ of certiorari from this Court. Because of the current posture of the case, this Court's jurisdiction "founders on the rule that a state-court decision is not final unless and until it has effectively determined the entire litigation. *Jefferson*, 522 U.S. at 84, 118 S. Ct. at 487. Accordingly, the Petition for Certiorari should be denied for lack of jurisdiction.

II. The ISC Correctly Determined that Idaho Code § 22-4803A(6) Did Not Constitute a Physical Taking of Petitioners' Properties.

The Takings Clause of the Fifth Amendment of the United States Constitution provides "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. This restriction is applicable to the states through the Fourteenth Amendment. *Chicago B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S. Ct. 581, 586, 41 L. Ed. 979 (1897). However, "the Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194, 105 S. Ct. 3108, 3120, 87 L. Ed. 2d 126 (1985); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003). The Fifth Amendment does not require that just compensation be paid in advance of, or contemporaneously with, the taking.

Id. All that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking. *Williamson*, 473 U.S. at 194-95, 105 S. Ct. at 3121. "If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation," then the property owner "has no claim against the Government for a taking." Inasmuch as a process in Idaho exists and given that Petitioners have not fully availed themselves of such process, the Petition for a Writ of Certiorari should be denied on the ground that it is premature. *Id.*

A physical taking occurs either when there is a condemnation or a physical appropriation of property.[3] *Tahoe-Sierra Preservation Council, Inc., et al. v. Tahoe Regional Planning Agency, et al.*, 535 U.S. 302, 322, 122 S. Ct. 1465, 1478 (2002). A physical occupation is a permanent and exclusive occupation by the government that destroys an owner's right to possession, use, and disposal of the property. The Federal Circuit has identified the destruction of these physical interests as follows:

> (1) possession, the owner has no right to possess the occupied space himself, and also has no power

3. "The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. * * * When the government *physically takes possession* of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 321-22. (citations omitted) (emphasis added).

> to exclude the occupier from possession and use of the space; (2) use, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property; and (3) disposal, even though the owner may retain the bare legal right to dispose of the occupied space . . . , the permanent occupation of that space . . . will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Boise Cascade Corp. v. United States, 296 F.3d 1339, 1353 (Fed. Cir. 2002) (citations omitted). Petitioners have not alleged and cannot reasonable assert herein that the State of Idaho has physically taken actual possession of their real property.

Petitioners' claim that Idaho Code § 22-4803A(6) constituted a physical taking revolve exclusively around their assertion that the enactment of that statute, by itself, constituted the granting to Respondents of an easement over Petitioners' property. In support of their argument, the Petitioners argued below and the trial court adopted the rule found in the Restatement of Property § 451, as applied by the Iowa Supreme Court in *Bormann v. Board of Supervisors*, 584 N.W. 2d 309 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999). In *Bormann*, the Iowa Supreme Court analyzed a nuisance immunity statute provision of Iowa Code 352.11(1)(a), in light of that State's longstanding rule that the right to maintain a nuisance is an easement. *Id.* at 315-16. The Iowa Supreme Court held that because the immunity provision acted to extinguish an existing property right, that portion of Iowa Code § 352.11 was unconstitutional.

The rationale of *Bormann* is of no relevance to and is easily distinguishable from the present case. The ISC squarely rejected Petitioners' invitation to adopt Restatement of Property § 451 and declined to hold that Idaho Code § 22-4803A(6) granted Respondents an easement. Neither the Idaho courts nor its legislature have ever recognized the right to maintain a nuisance as an easement. While the precise contours of the term "property" are not well delineated, it is settled law that the Constitution does not create property interests. Rather, "property" is a creature of independent origins. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030, 112 S. Ct. 2886, 2901, 120 L. Ed. 2d 798 (1992); *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972); *Tarpeh-Doe v. United States*, 904 F.2d 719, 723 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 955, 112 L. Ed. 2d 1043 (1991). Accordingly, by enacting Idaho Code § 22-4803A(6), the Idaho Legislature did not "take" any part of Petitioners' bundle of property rights.[4] Petitioners rely upon *Kaiser Aetna v. United States*,

4. In addition to *Bormann*, petitioners refer to two older cases of this Court, *Baltimore & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 2 S. Ct. 719, 21 L. Ed. 739 (1883) and *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S. Ct. 654, 58 L. Ed. 1088 (1914). Those cases are inapposite to this matter. First, *Fifth Baptist* was not a takings case; rather it was a 19th century garden-variety nuisance action. Second, *Richards* supports Respondents' position because the alleged effects of burning here applies equally to everyone, not just one or two pieces of property. The issue in *Richards* was whether the owner of a home in the District of Columbia could recover damages under a nuisance theory based upon the effects of the operation of a nearby rail line. The rail line had been constructed on land that the Congress had set aside for that purpose, and the legislation prescribing the nature of the improvements to be made was enacted at or about the time the complainant purchased his

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property. *See Id.* at 557 ("the case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city").

Two types of operations were challenged: (a) the ordinary use of the line with the attendant smoke, cinders and vibrations, and (b) the use of a tunnel whose fans blew the gases and smoke from the entire length of the tunnel at a single point directly into plaintiffs' residence. *Id.* at 549-50. This Court held that as to the first type of operation that affected all the landowners, the elements of damage had been correctly held to be *damnum absque injuria* (i.e. for which no damages could be obtained). However, as to the gases and smoke emitted from engines in the tunnel and forced out of it directly onto plaintiff's property, this Court stated:

> The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present.

Id. at 557.

444 U.S. 164, 179-80 (1979) for the proposition that the mere enactment of HB 391 constitutes a "physical invasion of the home and is an unconstitutional taking." Petition at 14. Petitioners argument is without merit. In *Kaiser Aetna*, this Court held that the United States was required to pay just compensation to the owners of a private marina in Hawaii for creating a public right of access to otherwise private, albeit navigable, waters. Petitioners attempt to transform their unproven allegations regarding the infrequent alleged migration of particulates onto their property during the burning season of August and September caused by the state regulated burning of Kentucky bluegrass straw and stubble during a short period of time into a complete and total taking of Petitioners real property.[5] This argument fails because HB 391 is an ordinary regulation which does not rise to the level of a taking, particularly of a property right (i.e. nuisance as an easement) that has never existed under Idaho law.

(Cont'd)

The holding in *Richards* was not predicated on a conclusion that a compensable taking had occurred, but on this Court's construction of the underlying statutes which did "not authorize the imposition of so direct and peculiar and substantial a burden on plaintiff's property without compensation to him." *Id.* at 557. This conclusion was based on the harm to complainant's property that differed from the harm experienced "generally by property owners whose lands lie within the range of the inconveniences necessarily incident to proximity to a railroad." *Id.*

5. It is important to note that none of Petitioners' expert witnesses provided any testimony or report specifically linking particulates allegedly caused by the burning of a particular farmer's field with the alleged trespass of those particulates on any of the Petitioners parcels of real property. It also ignores hundreds of other sources of particulates which may also migrate onto Petitioners' properties on a daily basis throughout the year.

III. This Petition is Premature inasmuch as the ISC Has Not Issued a Final Decision in Petitioners Independent Takings Action Against the State of Idaho.

Petitioners' request for a writ of certiorari should also be denied because they have brought an independent action pending against the State of Idaho before another trial court. ("State of Idaho action"). In the State of Idaho action, the Petitioners are seeking both a declaration that § 22-4803A(6) constituted an unconstitutional taking of their property and monetary damages as "just compensation." No discovery has been conducted, no trial held and accordingly no final decision has been issued in the State of Idaho action. It is critical to note that the State of Idaho is not a party to the instant action. Assuming *arguendo* that Petitioners obtain an unfavorable final decision on their Fifth Amendment claims in the State of Idaho action, they can then appeal such decision to the Idaho Supreme Court. After the ISC issues its decision, a petition for certiorari may be procedurally proper. Accordingly, granting certiorari on the issue of the constitutionality of the amendments to the Idaho Smoke Management Act would be improper in light of the fact that Petitioners are seeking damages in another action for Idaho's alleged taking of their property.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

GARY H. BAISE
Counsel of Record
ALEXANDER M. BULLOCK
STEWART D. FRIED
ANSON M. KELLER
KILPATRICK STOCKTON, LLP
607 14th Street, NW, Suite 900
Washington, DC 20005-2018
(202) 508-5800

PETER C. ERBLAND
PAINE, HAMBLEN, COFFIN,
BROOKE, & MILLER, LLP
701 Front Avenue, Suite 101
P.O. Box E
Coeur d' Alene, ID 83816-0328
(208) 664-8115

Attorneys for Respondents